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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 23.

GENERAL INSURANCE COMPANY OF AMERICA, a corporation,
Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
Respondent.

BRIEF OF RESPONDENT ON MERITS.

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STATEMENT OF THE CASE.

Respondent accepts the statement of the case made by Petitioner so far as it relates to the parties to the case, the time and place of the fire, the amount of loss, etc. The argument of Respondent will disclose any differences of opinion as to what the record contains. As there were but four witnesses and there are but fifty-three pages of testimony (R. 47-100) there will be no difficulty in determining the facts as disclosed by the evidence. In the argument herein Respondent is referred to as defendant and Petitioner is referred to as plaintiff. The map reproduced in this brief, Defendant's Exhibit A-1, shows the buildings at Badger. Kiona is seven miles to the West and Vista is nine miles to the East. The train which it is claimed set the fire was east bound.

ARGUMENT.

The opinion of the Circuit Court of Appeals covers two questions, first, was there sufficient evidence to take to the jury the question whether defendant's locomotive set the fire and second, was there sufficient evidence to take to the jury the question of negligence. The decision affirming the judgment in the trial court in favor of defendant is based upon a negative answer to the second question. In answer to the first question the Circuit Court of Appeals said:

> "It is the opinion of a majority of the court that although the question is not free from doubt, there were facts and circumstances sufficient to call for submission to the jury." (R. 118)

We propose to show not only that the Circuit Court of Appeals was right in determining that there was no evidence of negligence but also that the trial court was right in holding there was no evidence that defendant set the fire. The review of the evidence that follows is necessary to a decision on either question.

The question whether there was sufficient evidence that defendant set the fire to warrant its submission to the jury is not foreclosed by the opinion of the majority of the Circuit Court of Appeals, as plaintiff seems to assume, but is open for consideration here.

> "It is undoubted that by the operation of the writ of certiorari, granted in accordance with the provisions of the Judiciary Act of 1891, the entire record is before us with power to decide the case as it was presented to the Circuit Court of Appeals, by reason of the writ of error issued out of that court." *Lutcher & Moore Lumber Co. v. Knight,* 217 U. S. 257, 267.

"As the case is here upon certiorari to review the judgment of the Circuit Court of Appeals, this court has the entire record before it with the power to review the action of that court as well as direct such disposition of the case as that court might have done when hearing the writ of error sued out for the review of the action of the Circuit Court. *Lutcher & Moore Lumber Co. v. Knight,* 217 U. S. 257, 267." *Delk v. St. Louis & San Francisco R. R.,* 220 U. S. 580, 588.

As the judgment was in defendant's favor in the Circuit Court of Appeals defendant could not petition for certiorari. While a party may not complain of any part of a judgment from which he does not appeal, he surely may make any valid argument to sustain the judgment on which he relies. If the majority of the Circuit Court of Appeals was in error in holding the evidence was sufficient to take to the jury the question whether the defendant set the fire, the defendant may show that error in this court as a reason why the judgment of the Court of Appeals was right, though its reasoning on this one point was wrong. In that event there would be no occasion for this court to go further and determine whether the Circuit Court of Appeals was correct in holding that the evidence did not create a *prima facie* case.

The situation is somewhat analogous to that which exists on appeal to this court from a state court. The rule in such cases is given in *Crescent Live Stock Co. v. Butchers' Union,* 120 U. S. 141, 156:

"for it has been the uniform doctrine of this court that, where it appears that the judgment of the state court must be affirmed on other grounds disclosed in the record, it will not be reversed for an erroneous ruling of the state court on a Federal question not necessary to the decision of the cause. *Murdock v. City of Memphis,* 20 Wall. 590,

634; *Jenkins v. Loewenthal*, 110 U. S. 222; *Erwin v. Lowry*, 7 How. 172; *Gibson v. Chouteau*, 8 Wall. 314."

We do not mean to suggest that we entertain any doubt as to the correctness of the decision of the Circuit Court of Appeals on the question of negligence, but merely want to establish our right to show that there was no evidence that defendant set the fire.

THERE WAS NO EVIDENCE THAT DEFENDANT SET THE FIRE.

The first witness called by plaintiff was Higinio Fernandes, a sheep herder. He testified he was asleep in his shack on the night of May 2 when he was awakened by a section foreman of the defendant. The map does not show this shack, but if shown it would be in the upper right hand corner. He got up and went out to see what was wrong (R. 55). Though not sure he thought it was "pretty close to 10:00 o'clock" (R. 56). On direct examination he said he saw the fire on the southwest corner of the warehouse (R. 56). In answer to a question from the court he said: "All that side of the building was on fire" (R. 57). The warehouse was built on piles five or six feet from the ground (R. 70). Witness does not know whether or not there was fire on the ground when he arrived (R. 70). This witness was the principal witness for plaintiff and this is all the testimony he gave directly relating to the origin of the fire.

This witness testified that the railroad was mostly upgrade from Kiona to Badger, but did not testify that there was any grade through Badger (R. 61). His testimony on this point on cross-examination is:

"Q. Now, you were talking something about the grade from Kiona up to Badger. What do you know about the grade?

A. Well, I know that there is a grade going up the hill.

Q. Well, where does the grade run with reference to the Badger station? Is there still a grade when you get by what you call Badger?

A. *I don't think so.* (Italics supplied.)

Q. Isn't it a fact that three-quarters of a mile before you get into Badger you are on a level grade and on a descending grade? Do you know that?

A. Well, I ain't sure.

Q. And it had been the habit of the railroad company to put on a helper engine on freight trains at Kiona and the helper engine would cut off at Badger, wouldn't it? That is, ordinarily. That they would take the second engine off at Badger, isn't that right?

A. Sometimes." (R. 61.)

The testimony of this witness as to the way in which defendant's engines are operated was developed by the court:

"The Court: What do you see about the engines when they go up this grade?

A. I see lots of smoke.

The Court: How is that?

A. I see lots of smoke.

The Court: And what do you hear?

A. I don't hear nothing just the puffing.

Q. Just the puffing?

A. Yes, sir.

Q. And what did you see besides smoke?

A. Well, I didn't see anything much until this summer. I kind of watched this summer and I saw some sparks coming out of the engine.

Q. Sparks coming from where? (63-17)

A. From the chimney or whatever they call it, but I never paid attention before." (R. 59-60)

The fire occurred May 2, 1926, and this case was tried in November, 1927, so "this summer" refers to a period a year after the fire.

As to the wind, the testimony of this witness was:

"Q. And what was the—was there a wind or was it quiet?

A. At noon there was a wind blowing.

Q. There was a wind blowing?

A. Yes, sir.

The Court: You might ask him which way.

Q. What direction—which way?

A. It was a west wind." (R. 51)

No other witness testified about the wind or about the throwing of sparks.

There was no allegation that defendant had negligently permitted weeds and combustible material to accumulate on the right of way. Witness Fernandes testified that there is nothing but sand and sagebrush around Badger, and some weeds when the wind blows (R. 71). He later said he sometimes saw Russian thistles blowing around, but that he "never paid attention" (R. 79).

Plaintiff next called as a witness Hugh Palmer, who testified that he was fireman on one of two engines that hauled an east bound freight train of seventy cars through Badger about 9:45 or 9:50 P. M. on May 2; that he saw no fire until he got to Vista, a station nine miles east of Badger; that he then looked back and saw the sky illuminated and said to the engineer: "It looks like the whole town of Badger is afire." He testified that the run from Badger to Vista was made in fifteen or twenty minutes (R. 84-85). It was, therefore, but ten minutes after the train passed that, according to Fernandes' testimony *supra*, the whole south side of the warehouse was on fire.

Ben Agor, the next witness for plaintiff, testified to the existence of a grade between Kiona and Badger, but did not say

where it began or ended. He said the engines "labor very hard at times with a heavy load" (R. 91). In answer to the question, "And what is done by the railroad company at times to avoid this extra laboring on the grade—on the up grade?" he said, "I have noticed that sometimes they split the train" (R. 91). He was not at Badger at the time of the fire. As to the existence of combustible matter in the vicinity, his testimony was confined to three questions, as follows:

"Q. In that locality are there accumulations of dry weeds and other combustible material blowing around during a dry wind?

A. I have seen tumbleweeds and I have seen some papers around about the warehouse.

Q. Is the warehouse on the ground or off of the ground?

A. I imagine it is about three or four feet off of the ground.

Q. And is the opening—below the floor of the warehouse is it open or is it boarded up?

A. It is open." (R. 90-91)

On cross-examination his testimony was:

"Q. Did you intend to leave any impression with this jury that there was any blowing of weeds or thistles around this warehouse or under this warehouse at the time of this fire?

A. Well, what I have noticed during a hard wind there —I have noticed thistles blowing across the right of way at times. (101-55)

Q. You are not testifying that there were any thistles blowing at the time of the fire, are you?

A. Well, I was not there at the time of the fire, no." (R. 96)

The last witness, R. W. Dent, an insurance agent, proved the issuance of policies covering the wool stored in the warehouse (R. 97).

Defendant submits that the evidence on behalf of plaintiff is wholly insufficient to sustain a finding that the Railway Company set the fire. There is no evidence of a grade at Badger. There is no evidence that the engines were working steam when the train went through Badger station. There is no evidence that they were throwing sparks. There is no evidence of combustible material being near the warehouse at the time of the fire or that any engine of defendant threw sparks before the fire. No witness testified that there was a wind blowing later than noon on the day of the fire. Witness Fernandes' testimony is that ten minutes after the train passed, the south end of the building standing four or five feet from the ground was on fire between the floor and the roof. The whole building was on fire in twenty minutes. There is no evidence that there was any fire on the ground. That a spark could have accomplished all this in so short a time does not seem reasonable and no testimony was offered to substantiate such a conclusion. The comment of the trial court on this point when directing a nonsuit clearly states the total absence of evidence that defendant set the fire:

> "I confess in this case there is not any theory of the law that I can conceive of upon which I could tell the jury to predicate a verdict based upon facts, or a reasonable inference. There is no evidence that anyone ever saw any sparks emitted from this engine, and the only evidence with relation to sparks is that the first witness at one time saw some sparks emitted from an engine that was laboring and going up this grade with a train of cars. And there is an absence of any evidence as to any inflammable material either on the railroad track or between the railroad track and this warehouse or under the warehouse anywhere. And the further testimony is that at the time this particular train came to the station on the east, that the engineer looked back and saw the fire and remarked

that it looked as though the whole town of Badger was aflame.

"Now, for the Court to submit to the jury the question of fact as to whether a spark emitted from an engine in ten or fifteen or twenty-five minutes could create a flame that would cast such a reflection as to inspire the thought of this fireman, burning a wooden warehouse set on piles three and a half or four feet from the ground, and then the evidence shows that at ten o'clock, shortly after the train went by the fire was contained within the scope disclosed by the witness—I cannot conceive how I can do that.

"I am very loath always to grant nonsuits. I rarely do it, but when there is an absence of facts—Now then, the statement of Mr. Howe. The fact that the fire in the engine was the only fire disclosed by the evidence, I do not think that that could possibly be—supposing no evidence was presented, the Court could not possibly let a verdict stand upon the mere fact that an engine with fire in it passed a warehouse fifty feet away and the warehouse was aflame half an hour afterwards and the light created the impression upon the fireman as disclosed here." (R. 102-103)

That any one of several things might have caused this fire was shown on cross-examination. Witness Fernandes testified that the key to the warehouse was kept where anyone could get it (R. 75, 80); that hoboes frequented the place (R. 83); that there were many rats in the warehouse (R. 75); that there was considerable enmity between his outfit and another outfit in the vicinity (R. 65); that there was a public road running by the warehouse and that there were cooking utensils in the warehouse which had been used by the sheep shearers some days before (R. 76). Rats and matches have started many fires. Wool on which oil has been spilled is ideal for spontaneous combustion. It is common knowledge that innumerable fires occur, the origin of which is unknown.

Citation of authorities on this point would not help. Opinions of courts vary but we doubt if any well-considered case can be found in which a court permitted a verdict to stand on such evidence as was introduced in this case. We suggest that the majority of the Circuit Court of Appeals might well have hesitated to say there was a case for the jury on the question of setting the fire if they were not of the opinion that in no event could a recovery be had since there was no proof of negligence. We submit the judgment of the trial court on this question was right.

THERE WAS NO EVIDENCE OF NEGLIGENCE.

If it be determined that the majority of the Circuit Court of Appeals was right in holding the question of the origin of the fire was for the jury, there remains for consideration the question whether the Circuit Court of Appeals was right in holding that there was no evidence of negligence. That this is a question of general law which Federal courts may determine for themselves is clear. In *Black and White Taxicab and Transfer Company v. Brown and Yellow Taxicab and Transfer Company,* 276 U. S. 518, this court said:

> "As respects the rule of decision to be followed by federal courts, distinction has always been made between statutes of a State and the decisions of its courts on questions of general law. The applicable rule sustained by many decisions of this Court is that in determining questions of general law, the federal courts, while inclining to follow the decisions of the courts of the State in which the controversy arises, are free to exercise their own independent judgment. That this case depends on such a question is clearly shown by many decisions of this Court. *Swift v. Tyson,* 16 Pet. 1, 19, was an action on a bill of exchange. Mr. Justice Story, writing for the Court, fully expounded

§ 34 of the Judiciary Act. * * * *Railroad Company v. Lockwood*, 17 Wall. 357, 366, *declined to follow the state rule as to liability of common carriers for injury of passengers. Liverpool Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 443, held a question concerning the validity of a contract for carriage of goods is one of general law. *Baltimore & Ohio Railroad v. Baugh*, 149 U. S. 368, 370, *so held as to the responsibility of a railroad company to its employees for personal injuries. Beutler v. Grand Trunk Railway*, 224 U. S. 85, 88, *decides who are fellow-servants as a question of general law.*" (pp. 530-531) (Italics supplied.)

This brings us to an analysis of the Federal cases that are in point. We may first consider *Garrett et al. v. Southern Railway Company*, 101 Fed. 102 (Circuit Court of Appeals, Sixth Circuit, March 15, 1900). In this case the court, composed of Circuit Judges Taft, Lurton and Day, reviewed a judgment for the defendant, Southern Railway Company, entered upon a verdict of the jury in a suit to recover damages for alleged negligence resulting in the burning of a mill owned by plaintiff. It was claimed that the fire was caused by sparks emitted from an engine negligently constructed and operated by the defendant. Defendant denied that sparks from its engine set the fire, and denied negligence. The court held that mere ignition by sparks is not *prima facie* evidence of negligence. The Circuit Court of Appeals of the Ninth Circuit in the instant case, referring to the *Garrett case*, says:

"We are referred to decisions which hold that where the circumstances lead to the conclusion that the origin of the fire was from a locomotive, there is a *prima facie* case and the burden of showing that there was no negligence in construction or operation of the locomotive is upon the railroad company. The Supreme Court of Washington seems to have accepted that view. (Thorgrimson v. Northern

Pacific Ry., 64 Wash. 500; Shearman & Redfield on Negligence, sec. 675 et seq.; Elliott on Railroads, sec. 1766.) But in the better considered cases in the federal courts it is held that the question is one of general law and that it cannot be said that the mere ignition by sparks is *prima facie* evidence of negligence of the railroad company. Such was the opinion expressed by Judge Taft for the Court of Appeals of the Sixth Circuit in Garrett v. Southern Ry., 101 Fed. 102, a case quite like the one at bar, where the Court, after recognizing that there is contrariety of decision, cited the Nitroglycerin Case, 15 Wall. 524, and invoked the principle that one who charges negligence must prove it by showing that defendant, by his act or by his omission, has violated some duty incumbent upon him which has caused the injury complained of." (R. 119)

In the brief of plaintiff in support of its petition for a writ of *certiorari* the *Garrett case* is discussed and analyzed as follows:

> "The *Garrett* case does not hold that a jury may not infer negligence, from the fact of the fire, and thereby establish negligence. On the contrary it authorized such an inference and, your petitioner submits, it is highly favorable to your petitioner's contention. The *Garrett* case is the case chiefly relied upon by the court in deciding the case at bar against your petitioner." (p. 19)

In plaintiff's brief on the merits, counsel say:

> "Petitioner's only present request is that the Supreme Court of the United States adhere to the view expressed by its present Chief Justice when he wrote the opinion in the *Garrett* case." (p. 24)

Either the Circuit Court of Appeals of the Ninth Circuit or counsel for plaintiff has misread the opinion in the *Garrett case*. There was evidence at the trial of the *Garrett case* that

under approved methods of constructing and operating locomotives it was improbable that fire could be communicated by sparks from an engine without negligence. There was not a word of this sort of testimony in the instant case. In the *Garrett case* the trial judge instructed the jury that

> "as the plaintiffs charged the defendant with negligence, the burden was on the plaintiffs to show the defendant's negligence by a preponderance of the evidence; that when the plaintiffs *established* by such preponderance *the mere fact that the fire was caused by sparks from an engine of the defendant, it still remained for him to prove that the emitting of such sparks was due to defendant's negligence;* * * *." (p 103) (Italics supplied.)

It is the total absence of evidence of negligence that distinguishes the instant case from the *Garret case*. In the *Garrett case* the court said:

> "We think we must take as our guide in this action the intimation of the supreme court of the United States in the Nitroglycerin Case, 15 Wall. 524, 21 L. Ed. 206. In that case a lessor attempted to hold a lessee for damages for injuries to the building leased by the explosion of nitroglycerin while in charge of the defendants. Upon this point the court, speaking by Mr. Justice Field, held as follows:
>
> > 'This action is not brought upon the covenants of the lease. It is in trespass for injuries to the buildings of the plaintiff, and the gist of the action is the negligence of the defendants. Unless that be established, they are not liable. The mere fact that injury has been caused is not sufficient to hold them. No one is responsible for injuries resulting from unavoidable accident while engaged in a lawful business. A party charging negligence as a ground of action must prove it. He must show that the defendant by his act, or by his omission, has violated some duty incumbent

upon him, which has caused the injury complained of. The cases between passengers and carriers for injuries stand upon a different footing. The contract of the carrier being to carry safely, the proof of the injury usually establishes a prima facie case, which the carrier must overcome. His contract is shown, prima facie, at least, to have been violated by the injury. Outside of these cases, in which a positive obligation is cast upon the carrier to perform safely a special service, the presumption is that the party has exercised such care as men of ordinary prudence and caution would exercise under similar circumstances, and, if he has not, the plaintiff must prove it. Here no such proof was made, and the case stands as one of unavoidable accident, for the consequences of which the defendants are not responsible. The consequences of all such accidents must be borne by the sufferer as his misfortune. This principle is recognized and affirmed in a great variety of cases,—in cases where fire originating in one man's building has extended to and destroyed the property of others; *in cases where injuries have been caused by fire ignited by sparks from steamboats or locomotives,* or caused by horses running away, or by blasting rocks; and in numerous other cases which will readily occur to everyone.'

"We think that this language indicates that the Supreme Court of the United States would adhere to the older and more conservative view that the mere ignition by sparks is not prima facie evidence of negligence of the railroad company as a matter of law. *It may be that evidence as to the approved methods for preventing emission of dangerous sparks may justify an inference of fact that the fire could not have been thus communicated without negligence. This was the charge of the court.* The jury were given permission, from the mere fact of the ignition by sparks, to infer, if they could as a matter of fact, that it was caused by negligence; but the court de-

clined to charge them, as a matter of law, that it raised a presumption of negligence. The course of the court, we think, was well within the rule, as we understand the cases, which the supreme court of the United States has followed, and that no prejudice was done to the plaintiffs in the charge which was given. The judgment is affirmed." (pp. 103-104) (Italics supplied.)

Counsel failed to include in their excerpts from the court's opinion the part italicized in the last paragraph quoted above and so present an erroneous analysis of the opinion.

Granting, as counsel contend, the holding of the court is that proof of setting the fire creates no presumption of negligence as a matter of law, or otherwise expressed, does not require a verdict of negligence from the jury, it is equally true that the *Garrett case* does not hold that mere proof of setting a fire creates a *prima facie* case of negligence, i. e. evidence sufficient to justify but not compel a verdict for plaintiff. The trial court charged that (and this charge was approved) the mere fact that the fire was caused by sparks was insufficient and that proof of negligence was necessary. Evidence to show negligence was introduced, and it was only because it was introduced, that the case went to the jury.

What the *Garrett case* means appears from *Cincinnati, etc., Railway Company v. South Fork Coal Company,* 139 Fed. 528, in which Mr. Justice Lurton, then Circuit Judge, said:

"The presumption from evidence of a fire started by sparks from a railway engine is in many states determined by statute. But at the common law a prima facie case of negligence is not made out by mere evidence that it was started by sparks from a railway engine. The use of such engine being sanctioned by statute, there is no liability for a fire started from sparks unless the sparks were negligently suffered to escape. *The ground of action being,*

therefore, for the negligent escape of sparks, a case is not made out by mere proof that it was started by sparks in view of the fact that some sparks will escape despite the use of appliances to arrest them. Garrett v. Southern Ry. Co., 101 Fed. 102, 41 C. C. A. 237, 49 L. R. A. 645; 13 Am. & Eng. Ency. Law, 507, 508, and cases cited in notes. But evidence of escape of larger sparks than usual, or an unusual number of sparks, has been held prima facie evidence of want of due care." (p. 537) (Italics supplied.)

Counsel say this is *dictum,* and it probably is, but Judge Lurton was one of the three judges who decided the *Garrett case,* so there can be no question but that the opinion quoted expressed Judge Lurton's confirmed views on the subject. Counsel contend that inasmuch as the case Judge Lurton was considering was a collision between two trains, which the court held to create a presumption of negligence, by similar reasoning the setting of a fire by sparks from a locomotive should create a presumption of negligence. Counsel say: "A collision could occur, without negligence, as readily as a fire caused by sparks could occur without negligence" (Petitioner's Brief, p. 26). The fallacy in this reasoning is that sparks escape from locomotives in the normal and customary operation of railroads but collisions do not occur in the normal and customary operation of railroads, and indeed it would be a strange case in which a collision could occur in the absence of any negligence.

The *Garrett case* and the *South Fork Coal Company case* were cited by the Circuit Court of Appeals for the Sixth Circuit in *Louisville & Nashville R. R. Co. v. Bell,* 206 Fed. 395. The court said:

> "No one saw the spark enter the window and no one saw the kindling and first moments of the flames. Plaintiff depends wholly upon circumstantial evidence. This court

has considered that two things are essential to plaintiff's right to recover. First, that the fire was set by such a spark; and second, that the spark escaped through defendant's negligence. Garrett v. Railroad, 101 Fed. 102, 41 C. C. A. 237, 49 L. R. A. 645; Railway v. South Fork Co., 139 Fed. 528, 537, 71 C. C. A. 316, 1 L. R. A. (N. S.) 533. There is no statute in Tennessee declaring prima facie liability in such case, or changing the common-law rules of liability or of proof." (p. 397)

In the Ninth Circuit the rule relied upon by the Circuit Court of Appeals in the instant case had already been announced in *Northern Pacific Railway Company et al. v. Mentzer*, 214 Fed. 10, 22.

Plaintiff relies upon the decisions in the Circuit Court of Appeals of the Eighth Circuit and particularly an opinion by Judge Thayer in *McCullen v. Chicago & North Western Ry. Co.*, 101 Fed. 66 (March 26, 1900). In that case Judge Thayer said:

> "it is now comparatively well settled that a presumption of negligence does arise from the fact that sparks have issued from a passing locomotive of such size or in such volume as to kindle a fire and destroy adjacent property." (p. 70)

However, this statement must be taken in connection with the evidence in the case. As to that the court said:

> "With respect to the issue whether the fire in question was occasioned by a spark from one of its locomotives, the defendant offered much expert testimony to the effect that a spark could not have been emitted by either of its locomotives, and carried a distance of 302 feet from its track, which would have retained sufficient vitality to have set fire to the slats of the ventilator under the conditions which existed at the time the fire took place. On the other hand, a railroad engineer who was called by the plaintiff

testified, in substance, that under such conditions as prevailed on the day of the fire,—with the wind from the north, blowing about 10 miles an hour, and the train moving on an upgrade,—a spark might have been carried 302 feet, and might have set fire to such slats as were in the ventilator, although the ventilator was at a height of 35 feet above the ground, provided the spark arrester of either engine was at the time in a defective condition. Another witness, who met the train in question on the day of the fire a few miles east of the town of St. Lawrence, also testified that the leading or head locomotive was then emitting large sparks, which floated 264 feet from the track, as ascertained by a subsequent measurement. Another witness testified, in substance, that he had, on one occasion previous to the fire, seen sparks emitted by locomotives which were in use by the defendant company that rose to a considerable height, and floated as much as 600 feet from the track, before they expired." (pp. 68-69)

Surely this is enough to distinguish the *McCullen case* from the instant case. We believe the Circuit Court of Appeals of the Eighth Circuit has, since the *McCullen case,* gone as far and perhaps farther than any other Federal court in holding the statutory presumption overcome as a matter of law by evidence of the railway company. *Woodward v. Chicago, M. & St. P. Ry. Co.,* 145 Fed. 577. If the instant case had been tried in the Eighth Circuit it does not follow from the holding in the *McCullen case* that the Circuit Court of Appeals for the Eighth Circuit would ever have sustained a verdict for the plaintiff on this record.

The Circuit Court of Appeals of the Sixth Circuit in the *Garrett case* relied upon the *Nitro-Glycerine case.* This court has never qualified its holding in that case but cited it with approval in *New Orleans & N. E. R. R. Co. v. Harris,* 247 U. S. 367, a case arising under the Federal Employers' Liability Act tried in the state courts of Mississippi. This court said:

"The federal courts have long held that where suit is brought against a railroad for injuries to an employe resulting from its negligence, such negligence is an affirmative fact which plaintiff must establish. *The Nitro-Glycerine Case,* 15 Wall. 524, 537; *Patton v. Texas & Pacific Ry. Co.,* 179 U. S. 658, 663; *Looney v. Metropolitan R. R. Co.,* 200 U. S. 480, 487; *Southern Ry. Co. v. Bennett,* 233 U. S. 80, 85." (p. 371)

In the *Patton case,* referred to above, the court said:

"And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employe is unable to adduce sufficient evidence to show negligence on the part of the employer it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs." (p. 663)

As we have a question of general law the decisions of the Supreme Court of Washington are not controlling, but admitting that that court has adopted the rule that proof of setting a fire establishes a *prima facie* case of negligence, nevertheless, in the application of that rule it is found that in cases in which there was a recovery there was some evidence of negligence on the part of the defendant.

Counsel for plaintiff evidently appreciate the necessity for showing evidence of negligence for their first point is:

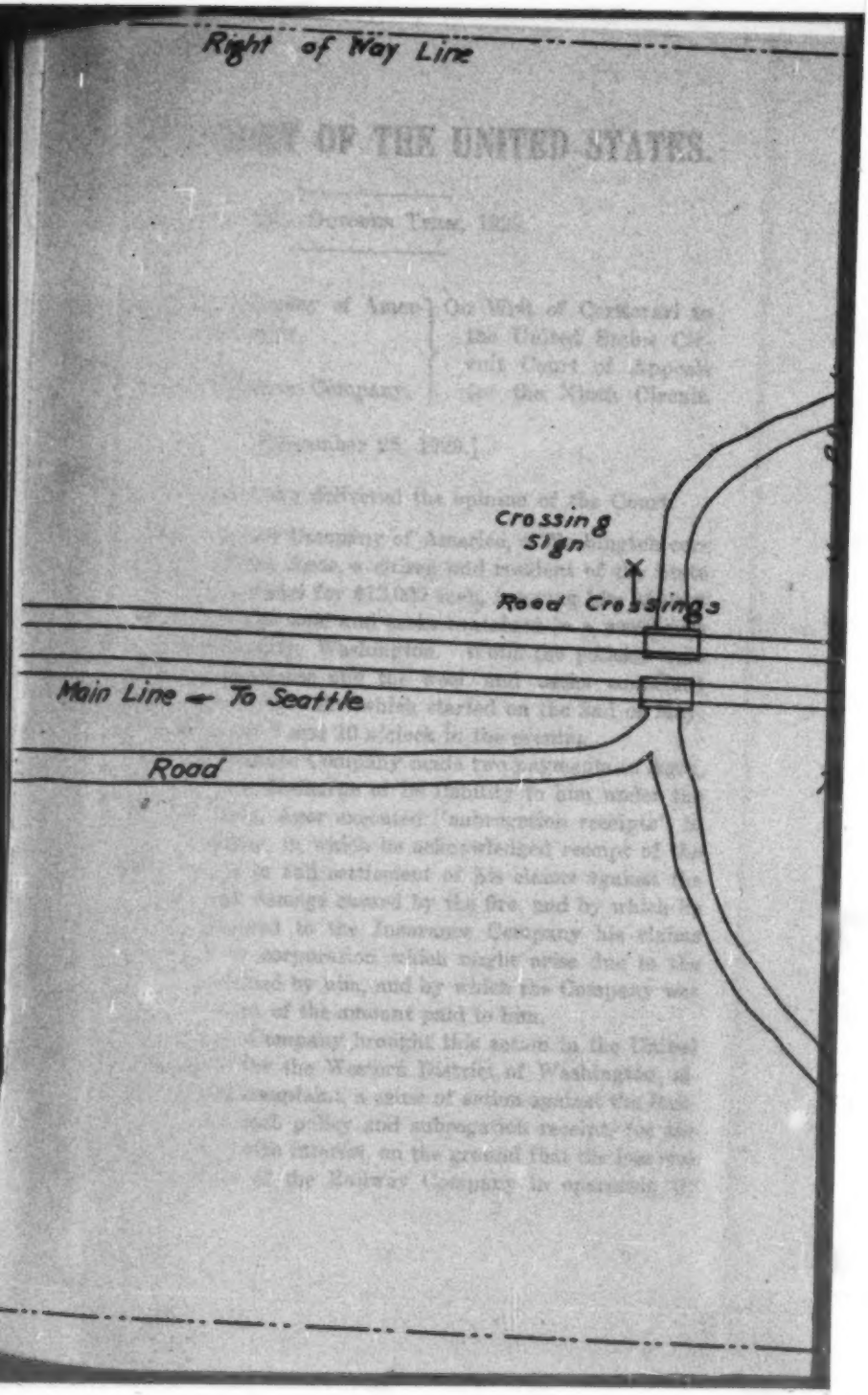
"Petitioner contends that the evidence discloses facts from which a reasonable person could have justifiably drawn the inference that respondent was negligent." (Brief of Petitioner, p. 7.)

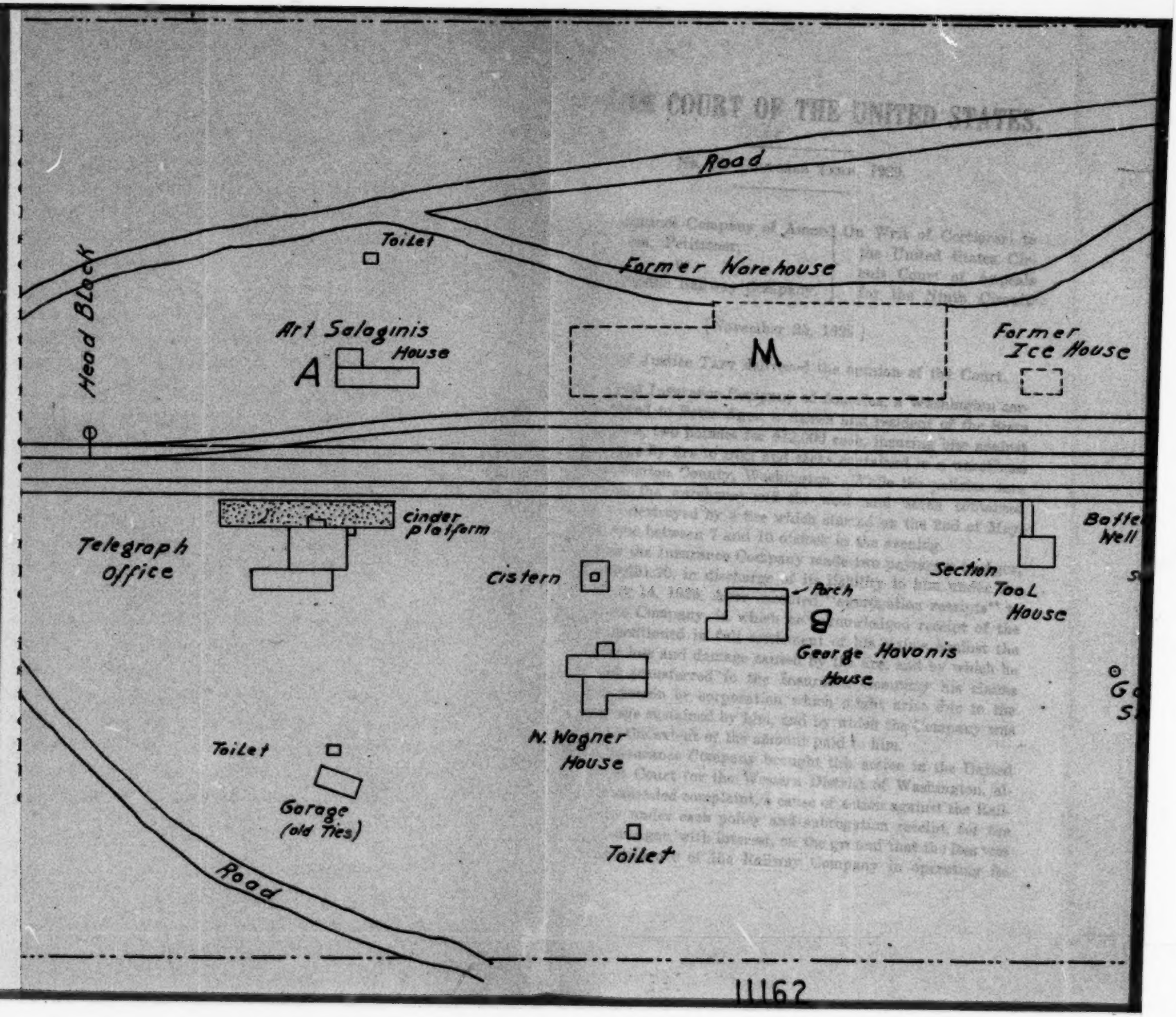
However, the only evidence of negligence put forth in support of this point is the testimony of one witness, Ben Agor, that defendant sometimes divided its trains between Kiona and Badger. All he said was: "I have noticed that sometimes they split the train" (R. 91). There is no testimony as to the circumstances under which trains are cut or how often that happens. There is no testimony that trains are cut to avoid the fire hazard rather than because the engine is unable to handle the load over a grade. In this connection it should be remembered that there is no evidence of a grade at Badger and therefore the cutting of a train could have no relation to operation through Badger. The train complained of was a train of seventy cars drawn by two engines on the main line of the Northern Pacific. The fireman testified that it was a light train (R. 87). There was no evidence that this particular train should have been cut. Indeed it is hard to believe that any witness would give testimony so manifestly untrue. This "first point" merely emphasizes the fact that the record is bare of evidence of negligence.

Plaintiff is asking the court to reverse a rule that has been in effect in this court and in Federal courts generally, at least since the decision in the *Nitro-Glycerine case, supra,* more than fifty years ago. We submit that plaintiffs in negligence cases are now highly favored in the law, and that they have little difficulty in obtaining verdicts in meritorious cases. We believe that nothing has been shown to justify changing the established rule in negligence cases in Federal courts.

Respectfully submitted,

L. B. daPONTE,
DENNIS F. LYONS,
Attorneys for Respondent.


Right of Way Line
Crossing Sign
Road Crossings
Main Line ← To Seattle
Road


Road
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George Havonis
House
Section
Tool
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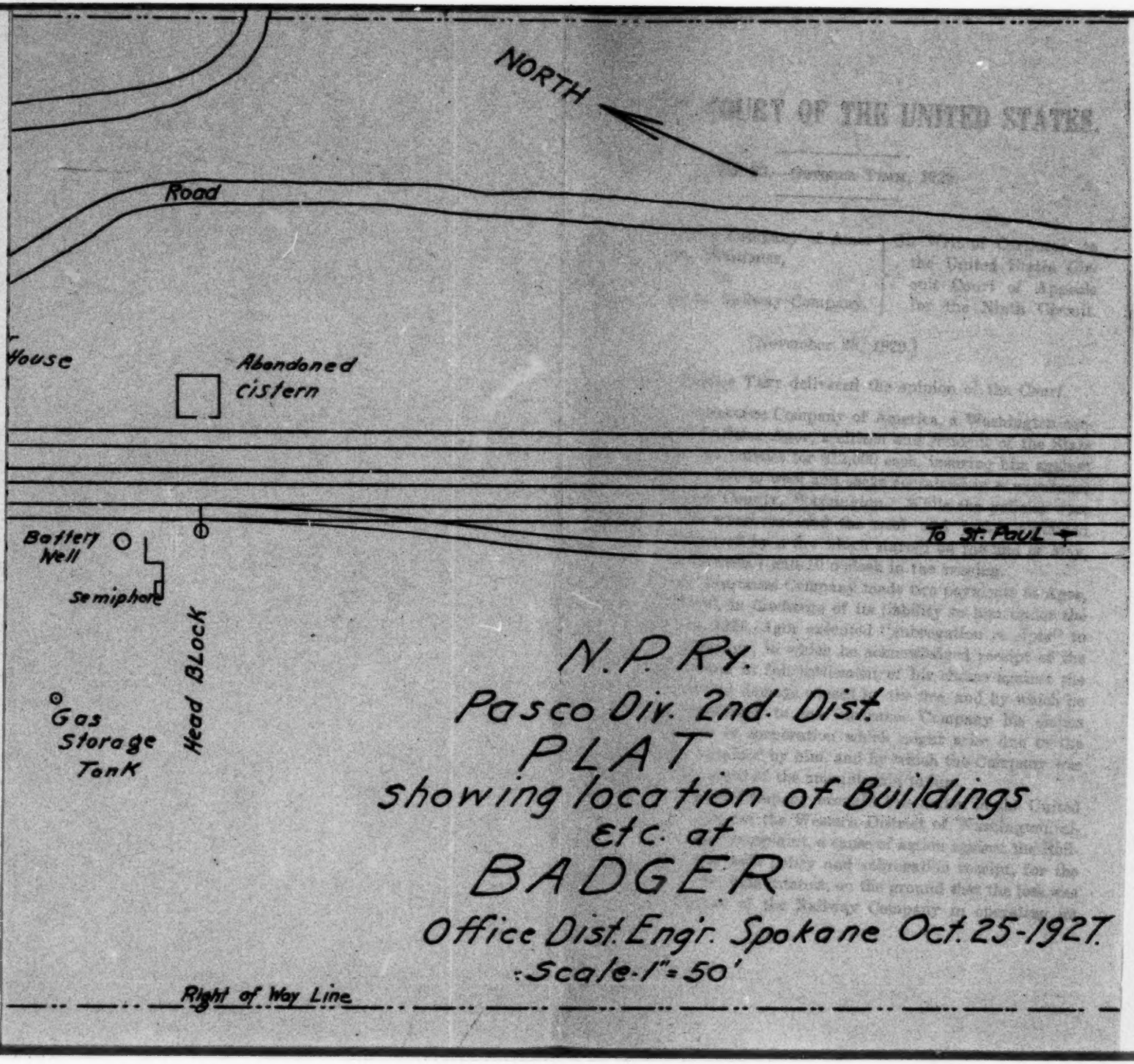
NORTH
Road
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Abandoned
cistern
Battery
Well
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Head BLock
Gas
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Tank
To St. Paul
N. P. Ry.
Pasco Div. 2nd. Dist.
PLAT
showing location of Buildings
etc. at
BADGER
Office Dist. Engr. Spokane Oct. 25-1927.
Scale-1"=50'
Right of Way Line